No. 98-190

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

JOHN NORMAN HUFFINGTON,

Petitioner,

v.

EUGENE NUTH, Warden and ATTORNEY GENERAL OF THE STATE OF MARYLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In order to ensure that the important questions presented in this case are not obscured by the misstatements in Respondents' Brief in Opposition ("Opp." or "Opposition"), this Reply addresses three points: (i) there is no "intra-circuit" conflict in the Second and Ninth Circuits on the first Question Presented by the Petition; (ii) neither Question Presented is barred by *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion); and (iii) the State repeatedly mischaracterizes the record.

I. There Is No "Intra-Circuit" Conflict in the Second and Ninth Circuits

The State concedes that the Fourth Circuit "construe[s] *Green* and *Chambers* as requiring only the admission of reliable, directly exculpatory evidence." (Opp. at 12). It then argues that the appellate courts are plagued with intra-circuit conflicts regarding the significance of impeachment evidence under *Green v. Georgia*, 442 U.S. 95 (1979), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). (Opp. at 13). If true, such pandemic intra-circuit conflicts on a single issue would warrant review by this Court. In any event, that situation is not presented here.

Grochulski v. Henderson, 637 F.2d 50 (2d Cir. 1980), *cert. denied*, 450 U.S. 927 (1981), did not suggest any distinction between impeachment and exculpatory evidence. Despite a procedural peculiarity that caused the *Grochulski* evidence to be offered as impeachment, the actual evidence was – as the State concedes (Opp. at 13-14) – exculpatory confession evidence, which the appeals court found lacked sufficient reliability under *Chambers*. *Grochulski*, 637 F.2d at 55. Thus *Grochulski* involved no "impeachment" evidence as that term was used in the Fourth Circuit's opinion below.

The Ninth Circuit's opinion in *United States v. Fowlie*, 24 F.3d 1059 (9th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995), similarly did not concern the exclusion of material directly impeaching the prosecution's evidence at trial, but concerned the reliability of the proffered evidence. *Id.* at 1068, 1069. Although the *Fowlie* court also observed that the "tangential" evidence

offered by the defendant was far less important to his case than the "directly exculpatory" confession evidence in *Chambers*, it did not suggest (as the Fourth Circuit did below) that impeachment evidence generally lacks the importance required under *Chambers*. *See id.* at 1069.

II. There Is No *Teague* Bar

A. Huffington Does Not Propose a "New Rule"

No court so far has agreed with the State's assertion that Huffington proposes a "new rule" barred by the principles of *Teague v. Lane*.

1. Under *Green* and *Chambers*, Impeachment Evidence Can Be Reliable, Important Defense Evidence Whose Admission is Required by Due Process

The State concedes that Huffington's convictions became final for *Teague* purposes on July 7, 1986. (Opp. at 12). But the State then cites only cases decided *after* that date[1] to suggest that courts would have felt compelled, on July 7, 1986, to read into *Green* and *Chambers* the additional requirement that excluded evidence must be "directly exculpatory" to form the basis of a due process violation. (Opp. at 12-13).

The State thus overlooks that *Green* and *Chambers* were decided well *before* 1986, as were *Napue v. Illinois*, 360 U.S. 264 (1959), *Giglio v. United States*, 405 U.S. 150 (1972), and other opinions of this Court underscoring that due process significance does not depend upon whether evidence is labeled "impeachment" or "exculpatory." Moreover, well *before* July 7,

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[1] In its *Teague* argument, the State cites the 1994 decision in *Fowlie*, 24 F.3d 1059, which, as discussed *supra*, does not present a conflict with Huffington's position, and the 1989 decision in *United States v. Parker*, 877 F.2d 327 (5th Cir.), *cert. denied*, 493 U.S. 871 (1989), which similarly upheld the exclusion of evidence with at most "tangential" significance, *id.* at 332, but did not indicate that the exclusion of impeachment evidence generally could not form the basis of a due process violation under *Chambers* and *Green*. (*See* Opp. at 12-13).

1986, other courts considered due process violations based upon the exclusion of impeachment evidence under *Chambers* and *Green*. *E.g.*, *United States v. Benveniste*, 564 F.2d 335, 341 (9th Cir. 1977) (excluded hearsay would have "raised questions about [informant's] credibility" and "corroborate[d]" defendant's testimony supporting entrapment defense); *Commonwealth v. Bohannon*, 434 N.E.2d 163, 174 (Mass. 1982) (impeaching statements, "although not per se exclupatory," were "important" and "central to the defendant's case," but reliability test of *Chambers* not met). Indeed, the only Maryland judges to address Huffington's due process argument – the three dissenting justices in *Huffington v. State*, 500 A.2d 272, 293 (Md. 1985) (McAuliffe, J., dissenting), *cert. denied*, 478 U.S. 1023 (1986) – concluded in 1985 that *Green* and *Chambers* compelled relief for Huffington. *Id.* at 295 (McAuliffe, J., dissenting).[2]

2. The Sixth Amendment Requires that Counsel Conduct an Independent Investigation of His Client's Case

In arguing that Huffington proposes a new rule that counsel must conduct an independent investigation of his case, the State offers only the halfhearted suggestion that "Huffington's cases are . . . factually distinguishable" because they concern "alibi witnesses or eyewitnesses critical to the determination of guilt." (Opp. at 15).

This argument misrepresents the opinions cited by Huffington, which do not exclusively address the failure to investigate eyewitnesses or alibi witnesses. *E.g.*, *Commonwealth v. Baxter*, 640 A.2d 1271, 1274 (Pa. 1994) (failure to investigate criminal background of "Commonwealth's primary witness," which "would have severely undermined his credibility"); *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th

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[2] The *Huffington* majority never disagreed with Huffington's due process claim here, nor did it even mention *Green*, *Chambers*, or Huffington's constitutional interests in the admission of the Rassa transcript. *See* 500 A.2d at 274-79 (majority opinion).

Cir. 1984) (failure, *inter alia*, to interview police officers involved in taking defendant's statement and in pre-trial identification).

The State, relying in part on the Fourth Circuit's opinion below (App. at 13a ("*Most* of them involve alibi witnesses or eyewitnesses") (emphasis added)), has concocted a distinction that the courts have not drawn. More important, that distinction has no force where trial counsel failed to investigate a crucial witness. (A1057-58 ("I believed then and I believe now that . . . Mr. Rassa was a much better witness than anybody else that I could have located" for the defense); A1510-11 ("Mr. Huffington indicated to me that he [Rassa] would have been a--a critical witness."; "I agreed with Mr. Huffington that [Rassa] was an important witness").)

B. Even If Huffington Had Proposed a "New Rule," Relief Would Not Be Barred by *Teague*

Even if Huffington sought a "new rule," both Questions Presented concern "procedures that . . . are implicit in the concept of ordered liberty," "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction" and "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 307, 311-12 (internal quotations and citations omitted). Thus, both would also fall easily within *Teague*'s second exception to the general rule of nonretroactivity for cases on collateral review. *Teague*, 489 U.S. at 307. Both the opportunity to present reliable, critical evidence and the guarantee of representation by an advocate who fulfills, rather than abdicates, his obligation to investigate the case are essential to a defendant's "fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). Surely Huffington "break[s] no new ground in observing that an essential component of procedural fairness is an opportunity to be heard," *id.* at 690, and that a defendant deprived of both message and messenger has been denied a fair trial.

III. The State's Other Misstatements of the Record Do Not Reduce the Importance of the Questions Presented

In its effort to portray this case as fact-bound and Huffington as guilty (*e.g.*, Opp. at 15, 19), the State (A) excerpts a *different* Huffington trial record to summarize the case at hand, (B) attacks a defense theory Huffington never advanced, and (C) concocts an "admission" Huffington never made.

A. The Misstatement of the Facts

The State highlights a lengthy factual statement from the Maryland decision reviewing Huffington's first trial (Opp. at 5-10, 16, 17, 19); but that court never heard of Stephen Rassa or his key testimony, and that trial is not under review here. This excerpt parrots faithfully the testimony of Deno Kanaras and makes no mention of Rassa's devastating attack on that testimony, since the existence of Rassa and other key defense witnesses had been suppressed by the State at Huffington's first trial. This misleading "factual" basis omits any mention of the Rassa evidence that three Justices of the Maryland Court of Appeals concluded was so "necessary for the proper presentation of [Huffington's] case" that its omission required reversal of Huffington's conviction. *Huffington*, 500 A.2d at 293, 295 (McAuliffe, J., dissenting).

B. The Invented Defense Theory

The State repeatedly misstates Huffington's defense. For example, the States suggests that Huffington claims merely that Kanaras was the "principal" in the murders, but that Huffington also was present during the killings. (*See, e.g.*, Opp. at 17 (emphasis added); Opp. at 18 (Kanaras was "sole criminal agent" and Huffington was "mere innocent associate"); *and* Opp. at 14, 16 ("Huffington accompanied Kanaras . . . on the night of the murders but was not involved in the killings")). This is not the first time the State has offered this misstatement. Indeed, the District Court below found that the magistrate "misunderst[ood]" Huffington's defense theory because he was similarly "misled" by the State. (App. at 41a-42a & n.1). Huffington has always

maintained that he was not present when the murders took place, and that Deno Kanaras' testimony to the contrary is false.[3]

C. The Imagined "Admissions"

The State repeatedly and erroneously asserts that Huffington, who has consistently maintained his innocence, at some point admitted guilt. (*E.g.*, Opp. at 16-17). Throughout the long and tortured record of this case, there is no court finding of any admission of guilt by Huffington. The State's false assertion of such an admission reveals the weakness of its position.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Huffington's testimony in his first trial is not relevant here, but it was also entirely consistent with this defense. Moreover, Huffington has never advanced the theory now attacked by the State "that [he] was not present at Ms. Becker's trailer at any time on the night of the murders . . . ." (Opp. at 17). Huffington himself testified at his first trial that he was at the trailer before the murders occurred (*e.g.*, *Huffington v. State*, 452 A.2d 1211, 1214 (Md.1982)), and his counsel at retrial argued as much to the jury. (A0865-66).